



NATIONAL RAILWAY UTILIZATION CORPORATION

1100 Centre Square East / 1500 Market Street / Philadelphia, Pennsylvania 19102 / (215) 569-2220

December 28, 1978

9973

RECORDATION NO. Filed 1425

DEC 28 1978 - 2 45 PM

INTERSTATE COMMERCE COMMISSION

9973 A

RECORDATION NO. Filed 1425

DEC 28 1978 - 2 45 PM

INTERSTATE COMMERCE COMMISSION

Interstate Commerce Commission
12th and Constitution Avenue N.W.
Washington, D. C. 20423

Attention: Mrs. Lee
Room 1227

Date DEC 28 1978
FEE \$ 50.00
[Signature]

Gentlemen:

It is hereby respectfully requested that the following documents be recorded pursuant to the provisions of Section 20c of the Interstate Commerce Act:

1. Conditional Sale Agreement, dated as of December 29, 1978:

Vendor: Whittaker Corporation
(Berwick Forge & Fabricating Division)
West Ninth Street
Berwick, Pa. 18603

Vendee: (Purchaser)
National Railway Utilization Corporation
1100 Centre Square East
1500 Market Street
Philadelphia, Pa. 19102

2. Agreement and Assignment (of Conditional Sale Agreement), dated as of December 29, 1978:

Assignor (Vendor-Builder):
Whittaker Corporation
(Berwick Forge & Fabricating Division)
(address as stated above)

Assignee: New England Merchants National Bank
28 State Street
Boston, Mass. 02109

FEE OPERATION BR.
I.C.C.

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RECEIVED

Mark Lloyd
[Signature]



Interstate Commerce Commission
December 28, 1978
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General Description of the Equipment:

56 Boxcars, Type XM (50' - 6", 70-ton), bearing Road Numbers
NSL 150494 - NSL 150549 (both inclusive), and each being marked:

"Ownership subject to a Security Agree-
ment filed under the Interstate
Commerce Act, Section 20c"

Sincerely,

A handwritten signature in dark ink, appearing to read "John A. Mariscotti", is written over the typed name.

John A. Mariscotti
Executive Vice President

JAM:ebw

AGREEMENT AND ASSIGNMENT (the "Assignment") dated as of December 29, 1978 between WHITTAKER CORPORATION, BERWICK FORGE & FABRICATING DIVISION, (the "Builder") and NEW ENGLAND MERCHANTS NATIONAL BANK (the "Assignee").

WHEREAS, the Builder and National Railway Utilization Corporation ("NRUC") have entered into a Conditional Sale Agreement dated as of the date hereof (the "Conditional Sale Agreement"), covering the construction, sale and delivery, on the conditions therein set forth, by the Builder and the purchase by NRUC of the railroad equipment described in Exhibit A to the Conditional Sale Agreement (the "Equipment"); and

WHEREAS, NRUC has requested the Assignee to finance its purchase of the Equipment by purchasing the Conditional Sale Agreement and executing this Assignment with the Builder; and

WHEREAS, the Assignee has agreed to provide such financing and to execute this Assignment;

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration paid by the Assignee to the Builder, the receipt of which is hereby acknowledged, as well as of the mutual covenants herein contained, the parties hereto agree as follows:

SECTION 1. The Builder hereby assigns, transfers, and sets over unto the Assignee, its successors and assigns:

(a) All the right, security title and interest of the Builder in and to each unit of the Equipment, and the security interest of the Builder in the

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Filed 1425

Additional Security (as defined in Article 6 of the Conditional Sale Agreement) and;

(b) All the right, title and interest of the Builder in and to the Conditional Sale Agreement (except the right to construct and deliver the Equipment and the right to receive reimbursement for taxes paid or incurred by the Builder) (as identified in Article 4 of the Conditional Sale Agreement), and except as aforesaid in and to any and all amounts which may be or become due or owing to the Builder under the Conditional Sale Agreement on account of the Conditional Sale Indebtedness (as defined in the Conditional Sale Agreement) of the Equipment and interest thereon, and in and to any other sums becoming due from NRUC under the Conditional Sale Agreement, other than those excluded above; and

(c) Except as limited by subparagraph (b) of this paragraph, all the Builder's rights, titles, powers, privileges and remedies under the Conditional Sale Agreement,

without any recourse hereunder, however, against the Builder for or on account of the failure of NRUC to make any of the pay-

ments provided for in, or otherwise to comply with, any of the provisions of the Conditional Sale Agreement; provided, however, that this Assignment shall not subject the Assignee to, or transfer, or pass, or in any way affect or modify, the obligations of the Builder to deliver the Equipment in accordance with the Conditional Sale Agreement or with respect to its warranties and agreements contained in Article 15 of the Conditional Sale Agreement or relieve NRUC from its obligations, if any, to the Builder contained in the Conditional Sale Agreement, it being understood and agreed that, notwithstanding this Agreement, or any subsequent assignment pursuant to the provisions of Article 16 of the Conditional Sale Agreement, all obligations of the Builder to NRUC with respect to the Equipment shall be and remain enforceable by NRUC, and its successors and assigns, against and only against the Builder. In furtherance of the foregoing assignment and transfer, the Builder hereby authorizes and empowers the Assignee in the Assignee's own name, or in the name of the Assignee's nominee, or in the name of and as attorney, hereby irrevocably constituted, for the Builder, to ask, demand, sue for, collect, receive and enforce any and all sums to which the Assignee is or may become entitled under this Assignment and compliance by NRUC with the terms and agreements on its part to be performed under the Conditional Sale Agreement, but at the expense and liability and for the sole benefit of the Assignee.

SECTION 2. The Builder agrees that it shall construct the Equipment in full accordance with the Conditional Sale Agreement, and will deliver the same upon completion to NRUC in accordance with the provisions of the Conditional Sale Agreement; and that, notwithstanding this Assignment, it will perform and fully comply with each of and all the covenants and conditions of the Conditional Sale Agreement set forth to be performed and complied with by the Builder. The Builder further agrees that it will warrant to the Assignee and NRUC that at the time of delivery of each unit of the Equipment under the Conditional Sale Agreement it had legal title to such unit and good and lawful right to sell such unit and that title to such unit was free of all claims, liens, security interest and other encumbrances of any nature except only the rights of NRUC under the Conditional Sale Agreement; and the Builder further agrees that it will defend the title to such unit against the demands of all persons whomsoever based on claims originating prior to the delivery of such unit by the Builder under the Conditional Sale Agreement; all subject, however, to the provisions of the Conditional Sale Agreement and the rights of NRUC thereunder. The Builder will not deliver any of the Equipment to NRUC under the Conditional Sale Agreement until the Conditional Sale Agreement and this Assignment have been filed and recorded in accordance with Section 20c of the Interstate Commerce Act (the Builder and its counsel being entitled to rely on advice from counsel for NRUC that such filing and recordation have occurred).

SECTION 3. The Builder agrees with the Assignee that in any suit, proceeding or action brought by the Assignee under the Conditional Sale Agreement for any installment of, or interest on, the Conditional Sale Indebtedness (as defined in the Conditional Sale Agreement) the Equipment or to enforce any provision of the Conditional Sale Agreement, the Builder will indemnify, protect and hold harmless the Assignee from and against all expense, loss or damage (including, but not limited to, reasonable counsel fees) suffered by reason of any defense, setoff, counterclaim or recoupment whatsoever claimed by NRUC arising out of a breach by the Builder of any obligation with respect to the manufacture, construction, delivery or warranty of the Equipment, or by reason of any defense, setoff, counterclaim or recoupment whatsoever arising by reason of any other indebtedness or liability at any time owing to NRUC by the Builder. The Builder's obligation so to indemnify, protect and hold harmless the Assignee is conditional upon (a) the Assignee's timely motion or other appropriate action, on the basis of Article 16 of the Conditional Sale Agreement, to strike any defense, setoff, counterclaim or recoupment asserted by NRUC in any such suit, proceeding or action and (b) if the court or other body having jurisdiction in such suit, proceeding or action denies such motion or other action and accepts such defense, setoff, counterclaim or recoupment as a triable issue in such suit, proceeding or action, the Assignee's prompt notification to the Builder of the asserted defense, setoff, counterclaim or recoupment and the Assignee's giving the Builder the right,

at the Builder's expense, to compromise, settle or defend against such defense, setoff, counterclaim or recoupment.

Except in cases of articles or materials specified by NRUC and not manufactured by the Builder and in cases of designs, systems, processes, formulae or combinations specified by NRUC and not developed or purported to be developed by the Builder, the Builder agrees (except as otherwise specifically provided in the Conditional Sale Agreement), to indemnify, protect and hold harmless the Assignee from and against any and all liability, claims, costs, charges and expenses, including royalty payments and counsel fees, in any manner imposed upon or accruing against the Assignee or its assigns because of the use in or about the construction or operation of any of the Equipment of any design, system, process, formula, combination, article or material which infringes or is claimed to infringe on any patent or other right. The Assignee will give prompt notice to the Builder of any liability or claim actually known to the Assignee which is based upon any such alleged infringement and will give the Builder the right, at the Builder's expense, to compromise, settle or defend against such claim. The Builder agrees that any amounts payable to it by NRUC with respect to the Equipment, whether pursuant to the Conditional Sale Agreement or otherwise, not hereby assigned to the Assignee, shall not be secured by any lien, charge or security interest upon the Equipment or any unit thereof.

SECTION 4. On the Closing Date, the Assignee shall pay to the Builder an amount equal to the Conditional Sale Indebtedness, provided that there shall have been delivered to the Assignee (with an executed counterpart to NRUC), as provided in Article 16 of the Conditional Sale Agreement the following documents, in form and substance satisfactory to Assignee and to its counsel, in such number of counterparts as may be reasonably requested by said counsel:

(a) A bill of sale from the Builder to NRUC transferring to NRUC the Equipment, warranting to the Assignee and to NRUC that, at the time of delivery of such units under the Conditional Sale Agreement, the Builder had legal title to such units and good and lawful right to sell such units and that title to such units was free of all claims, liens, security interests and other encumbrances of any nature except only the rights of NRUC under the Conditional Sale Agreement, and covenanting to defend such title to the units against all other claims and demands whatsoever and to hold Assignee harmless from any loss or expense arising from any such claim or demand.

(b) A Certificate of Acceptance with respect to the units of the Equipment delivered as contemplated by Article 3 of the Conditional Sale Agreement;

(c) A Closing Certificate with respect to the units of Equipment executed by the Builder and NRUC as contemplated by Article 3 of the Conditional Sale Agreement;

(d) An invoice of the Builder for the units of Equipment accompanied by a certification by NRUC as to its approval thereof, ~~and a Builder's Certificate;~~

PCB 

(e) An opinion of counsel for NRUC, dated as of the Closing Date, to the effect that (i) NRUC is a duly organized and existing corporation under the laws of its jurisdiction of incorporation and has the power and authority to own its properties and to carry on its business as now conducted, (ii) the Conditional Sale Agreement has been duly authorized, executed and delivered by NRUC, and assuming due authorization, execution and delivery by the other party thereto, is a legal and valid instrument binding upon NRUC and enforceable against NRUC in accordance with its terms (iii) the entering into and performance by NRUC of the Conditional Sale Agreement will not result in any breach of or default under any other agreement or instrument to which NRUC is a party or by which NRUC is bound, (vi) no mortgage, deed of trust, or other lien of any nature whatsoever which now covers or affects, or which may hereafter attach to the Equipment delivered to NRUC pursuant to the Conditional Sale Agreement, or in any

manner affects or will affect adversely the Vendor's or Assignee's right, title and interest therein;

(v) the Conditional Sale Agreement and the Assignment have been duly filed and recorded with the Interstate Commerce Commission pursuant to Section 20c of the Interstate Commerce Act and the regulations promulgated thereunder, and financing statements evidencing the Assignee's security interest in the Equipment and Additional Security, have been filed for record on recordation in the offices of the Secretary of State of the State of South Carolina and the Commonwealth of Pennsylvania and the Prothonotary of Philadelphia County, (vi) the security interest in the Equipment and the Additional Security has been created, all applicable requirements of law relating to the perfection and priority of purchase money security interest is and will be superior to any other private lien or encumbrance placed against the Equipment and/or the Additional Security, (vii) no approval of the Interstate Commerce Commission or any other governmental authority is necessary for the valid execution and delivery of the Conditional Sale Agreement or this Assignment, and the terms thereof comply in all respects with the applicable provisions of the Interstate Commerce Act and the rules and regulations of the Interstate Commerce Commission thereunder, (viii) registration of the Conditional Sale Agreement or this Assignment is not

required under the Securities Act of 1933, as amended, and qualification of an indenture with respect thereto is not required under the Trust Indenture Act of 1939, as amended; and (ix) such opinion shall also cover such other matters as may reasonably be requested by the Assignee;

(f) An opinion of counsel for the Builder, dated as of such Closing Date, stating that (i) the Builder is a duly organized and existing corporation in good standing under the laws of its jurisdiction of incorporation and has the power and authority to own its properties and to carry on its business as now conducted, (ii) the Conditional Sale Agreement and this Assignment have all been duly authorized, executed and delivered by the Builder, and assuming due authorization, execution and delivery by the other parties thereto, are legal and valid instruments binding upon the Builder and enforceable against the Builder in accordance with their terms, and (iii) security title to the units of the Equipment is validly vested in the Assignee and such units, at the time of delivery thereof to NRUC under the Conditional Sale Agreement, were free from all claims, liens, security interest and other encumbrances (other than those created by the Conditional Sale Agreement).

In giving the opinions specified in subparagraphs (e) and (f) of this Section 4, counsel may qualify any opinion to the effect that any agreement is a legal, valid and binding

instrument enforceable in accordance with its terms by a general reference to limitations as to enforceability imposed by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally.

SECTION 5. The Assignee may assign all or any of its rights under the Conditional Sale Agreement, including the right to receive any payments due or to become due to it from NRUC thereunder. In the event of any such assignment, any such subsequent or successive assignee or assignees shall, to the extent of such assignment and upon giving the written notice required in Article 16 of the Conditional Sale Agreement, enjoy all the rights and privileges and be subject to all the obligations of the Assignee hereunder.

SECTION 6. The Builder hereby represents and warrants to and agrees with the Assignee, its successors and assigns:

(a) that it is a duly organized and existing corporation in good standing under the laws of its jurisdiction of incorporation and has the power and authority to own its own properties and to carry on its business as now conducted;

(b) that the Conditional Sale Agreement was duly authorized by it and lawfully executed and delivered by it for a valid consideration, that, assuming due authorization, execution and delivery thereof by NRUC, the Conditional Sale Agreement is, in so far as the Builder is concerned, a legal, valid and exist-

ing agreement binding upon the Builder in accordance with its terms and that it is now in force without amendment thereto;

(c) that this Assignment was duly authorized by it and lawfully executed and delivered by it for a valid consideration, and that assuming due authorization, execution, and delivery thereof by the other party thereto, this Assignment is insofar as the Builder is concerned, legal, valid and existing agreements binding upon the Builder in accordance with its terms;

(d) that the Assignee is vested with all the rights, titles, interests, powers and privileges of the Builder purported to be assigned to it by this Assignment, and that security title to and security interest in the units of Equipment and Additional Security is validly vested in the Assignee;

(e) agrees that it will from time to time and at all times, at the request of the Assignee or its successors or assigns, make, execute and deliver all such further instruments of assignment, transfer and assurance and to do such further acts and things as may be necessary and appropriate to give effect to the provisions set forth above and more perfectly to confirm the rights, titles and interests hereby assigned and transferred to the Assignee or intended so to be; and

(f) agrees that, upon request of the Assignee, its successors and assigns, it will execute any and all instruments which may be necessary or proper in order to discharge of record the Conditional Sale Agreement or any other instrument evidencing any interest of the Builder therein or in the Equipment or Additional Security.

SECTION 7. The terms of this Assignment and all rights and obligations hereunder shall be governed by the laws of the Commonwealth of Massachusetts, provided, however, that the parties shall be entitled to all the rights conferred by Section 20c of the Interstate Commerce Act, such additional rights arising out of the filing, recording or depositing of the Conditional Sale Agreement, any financing statement with respect thereto and this Assignment as shall be conferred by the laws of the several jurisdictions in which such documents or any financing statement with respect thereto shall be filed, recorded or deposited, or in which any unit of the Equipment shall be located, and any rights arising out of the markings on the units of the Equipment.

SECTION 8. This Assignment may be executed in any number of counterparts, but the counterpart delivered to the Assignee shall be deemed to be the original counterpart. Although this Assignment is dated as of the date first above written, for convenience, the actual date or dates of execution hereof by the parties hereto is or are, respectively, the date or dates stated in the acknowledgements attached hereto.

IN WITNESS WHEREOF, the parties hereto, each pursuant to due corporate authority, have caused this instrument to be executed in their respective corporate names by duly authorized officials and their respective corporate seals to be hereunto affixed and duly attested, all as of the date first above written.



[Corporate Seal]

ATTEST:

Peter C. Bayer

WHITTAKER CORPORATION, BERWICK
FORGE & FABRICATING DIVISION

By

Peter C. Bayer

NEW ENGLAND MERCHANTS NATIONAL
BANK

[Corporate Seal]

ATTEST:

Robert H. Quimby

By

L. Paul Fowler, FD

City of Phila.)
County of Phila.) SS.

I hereby certify, that on this 28th day of December 1978, before the subscriber, a Notary Public in and for said City and State, personally appeared ~~XXXXXXXXXXXX~~ Filer C. Bryer who, being by me duly sworn, says that he is President, General Manager of Whittaker Corporation, Berwick Forbe & Fabricating Division, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act of deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal, this 28th day of December, 1978.

Darlene Marquette
Notary Public

[Notarial Seal]

My Commission expires:

DARLENE MARQUETTE
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 13, 1982

)
) SS.
)

I hereby certify, that on this 27th day of December, 1978, before the subscriber, a Notary Public in and for said City and State personally appeared V. Paul Lawless who, being by me duly sworn, says that he is Banking Officer

of New England Merchants National Bank, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act of deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this day of December, 1978.


Notary Public

[Notarial Seal]

My Commission expires: 8-1-80

ACKNOWLEDGEMENT OF NOTICE OF ASSIGNMENT

Receipt of a copy of, and due notice of the assignment made by, the foregoing Agreement and Assignment is hereby acknowledged as of December 29, 1978. NRUC hereby agrees that, pursuant to and according to the terms of the Conditional Sale Agreement, all payments required by that agreement shall be paid to New England Merchants National Bank, 28 State Street, Boston, Massachusetts 02109, Attention: Equipment Financing Department.

NATIONAL RAILWAY UTILIZATION
CORPORATION

By

Ch. A. McManis

Title

Exec. V. President

[Corporate Seal]

Attest:

By:

Charles P. Tumbelle

Title:

Vice President -
Asst. Secretary

City of Phila.)
County of Phila.) SS.

I hereby certify, that on this 25th day of December, 1978, before the subscriber, a Notary Public in and for said City and State personally appeared John D. Mariscotti who, being by me duly sworn, says that he is a Exec. VP of National Railway Utilization Corporation, that one of the seals affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act of deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 25th day of December, 1978.

Charles Marquette
Notary Public

[Notarial Seal]

My Commission expires:

CHARLES MARQUETTE
Notary Public, Phila., Pa.
Exp. 12/31/80

Interstate Commerce Commission
Washington, D.C. 20423

12/28/78

OFFICE OF THE SECRETARY

John A. Mariscotti
Executive Vice Pres.
National RW. Utilization Corp.
1100 Centre Square East
1500 Market Street
Phila. Pa. 19102

Dear Sir:

The enclosed document(s) was recorded pursuant to the
provisions of Section 20(c) of the Interstate Commerce Act,
49 U.S.C. 20(c), on 12/28/78 at 2:45pm ,
and assigned recordation number(s) 9973 & 9973-A

Sincerely Yours,



H.G. Homme, Jr.,
Secretary

Enclosure(s)

SE-30-T
(2/78)